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In The

# Supreme Court of the United States

October Term, 1993

CHARLES K. ELDER,

*Petitioner,*

vs.

R.D. HOLLOWAY, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF AMICI CURIAE OF THE STATES OF HAWAII, DELAWARE, IDAHO, ILLINOIS, KANSAS, MASSACHUSETTS, MONTANA, PENNSYLVANIA, RHODE ISLAND, VERMONT, WYOMING AND THE TERRITORY OF AMERICAN SAMOA IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment on the issue of qualified immunity in the case of a federal plaintiff who was arrested on probable cause, but without a warrant, on his front porch, in that the relevant precedent, *i.e., Payton v. New York,* 445 U.S. 573 (1980), does not "clearly establish" federal constitutional law in the "particularized" and "relevant" sense necessary to overcome defendants' qualified immunity from suit, as established by *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)?

2. Whether, assuming, *arguendo,* that questions left unresolved by this Court's precedents can still generate "clearly established law" for purposes of qualified immunity analysis, the decision of the Court of Appeals now at the heart of Petitioner's attack on the judgment, *i.e., United States v. Al-Azzawy,* 784 F.2d 890 (9th Cir. 1985), *cert. denied,* 476 U.S. 1144 (1986), should be deemed to have made "clearly established law" that, if properly presented, would warrant denial of immunity?

3. Whether, if the foregoing do not dictate affirmance, the failure by Petitioner's counsel in any way to bring the ruling in *Al-Azzawy* to the attention of the District Court, and Petitioner's express concession in the Court of Appeals that *Al-Azzawy* is "distinguishable," requires affirmance in this case?

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### INTEREST OF THE AMICI CURIAE

The amici States have a vital interest in this case, in which this Court has been asked to overturn a judgment of the United States Court of Appeals for the Ninth Circuit that, we submit, properly affirmed a summary judgment in favor of the respondents here on the basis of qualified officer's immunity.

Each of the amici states employ many thousands of officials whose principal defense to personal damages liability under the Civil Rights Act of 1871, 42 U.S.C.

§ 1983, and other laws, is the doctrine of qualified officer's immunity that this Court announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has strengthened and refined in a series of rulings since. *See Davis v. Scherer*, 468 U.S. 183 (1984); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 535 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Siegert v. Gilley*, 111 S. Ct. 1789 (1991); *Hunter v. Bryant*, 112 S. Ct. 534 (1991) (per curiam). The amici States thus have an abiding interest in any decision that could affect qualified immunity doctrine.

The amici States are, at the outset, somewhat concerned that the real issue in this case has been lost by Petitioner, and by the judges of the Ninth Circuit Court of Appeals who dissented from the denial of *en banc* review, whose strong opinions may well have prompted the Court to grant review in this case.

Indeed, the critical issue included within the Question Presented by Petitioner is "whether [this] action against government officials for deprivation of constitutional or statutory rights is precluded by qualified immunity"? Pet. Br. at i. The procedural issue that Petitioner desires the Court to reach, namely, whether the failure of Petitioner's counsel to cite the case on which he now (apparently for the first time) seeks to obtain reversal of the District Court's judgment, is in fact far removed from this basic question. That question is three-fold: (1) whether this Court's failure in *Payton v. New York*, 445 U.S. 573 (1980), to require arrest warrants or the presence of exigent circumstances for arrests outside the arrestee's house is dispositive of the qualified immunity issue; (2) whether the summary judgment record requires affirmance in any event because a reasonable officer, faced



with the situation in which Defendants found themselves, would believe that exigent circumstances existed; and (3) whether the *dicta* of the Ninth Circuit in *United States v. Al-Azzawy*, 784 F.2d 89 (9th Cir. 1986), can create "clearly established law." Amici submit that, upon review of these issues, the Court should simply affirm the judgment without reaching the procedural issue raised by the Ninth Circuit's analysis of counsel's forfeiture.

Should the Court reach that procedural question, however, the amici States submit that the Court should still affirm. It has long been the law that "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913), and the Ninth Circuit's decision in this case is unremarkable in this regard. The Ninth Circuit's rule regarding the Plaintiff's burden in the District Court – requiring the Plaintiff to "identify the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established" (J.A. 39) – is procedurally sound, and is a reasonable corollary to the procedural protections this Court has found inherent in the doctrine of qualified immunity.

For these reasons, the amici States submit this Brief in support of Respondents, and thus urge the Court to affirm.

———♦———

## STATEMENT OF THE CASE

The amici States adopt Respondents' statement of the case.

## ARGUMENT

**A. Because the Issue of Whether Defendants are Entitled to Qualified Immunity is Plainly Included Within the Question Presented for Review, This Court Should First Address Whether, Irrespective of Petitioner's Counsel's Failure in the District Court, The Judgment Granting Immunity is Correct; On Such Review, the Court Should Affirm the Judgment.**

One of the most simple, yet fundamental, rules of this Court's practice is that "this Court reviews judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 & n.8 (1984) (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Williams v. Norris*, 12 Wheat. 117, 120 (1827); *McClung v. Silliman*, 6 Wheat. 598, 603 (1821)). Thus, "any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." *Whitley v. Albers*, 475 U.S. 312, 326 (1985) (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)). Moreover, this Court's rules make clear that "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1. In this case, the Question Presented plainly includes "whether [this] action against government officials for



deprivation of constitutional or statutory rights is precluded by qualified immunity. . . . ?" Indeed, this Court has been quite straightforward in addressing the merits of an immunity issue before launching into some of the more difficult procedural questions raised by immunity doctrine. See *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991); *Pulliam v. Allen*, 466 U.S. 522, 527-28 & n.5 (1984) (expressly invoking the predecessor of this Court's Rule 14.1).

This is plainly a case where the Court should exercise its prerogative to "affirm on any ground that the law and the record permit." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). For under any view of the issues before the District Court, the entry of summary judgment on the basis of *Harlow* immunity was correct. Indeed, that judgment was correct at a minimum three times over.

It is important to stress the properly strong protections that the doctrine of qualified immunity affords to government officers performing discretionary functions. Thus, the rule of qualified officer's immunity is a "protective" one that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Moreover, a federal plaintiff may not pierce qualified immunity merely by showing that a state officer violated state law or policy: "violation of a clear statute or regulation, although not the basis of suit," cannot become a ground on which to "deprive the official of qualified immunity from damages for violation of . . . constitutional provisions." *Davis v. Sherer*, 468 U.S. 183, 193 (1984). For a personal capacity lawsuit to survive a plea for summary

judgment based upon qualified immunity, there must be shown sufficient proof of a violation of "clearly established" "*American* law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (emphasis added).

That a federal constitutional right is "clearly established" in an "abstract" sense is also not enough. *Id.* at 639. It bears emphasis "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "*Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Therefore, the "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Id.* Where there is a "legitimate question" over the scope of a federal right, there can be no personal capacity liability. *Id.* at 535 n.12; *see also Anderson*, 483 U.S. at 640 (same). The issue is not merely whether the officer acted in a general manner "reasonably"; rather it is "whether the actions [alleged or which the summary judgment record evidences] are actions that a reasonable officer could have believed lawful" under federal law. *Id.* at 646 n.6. Thus, while immunity must be granted where the record fails to disclose violation of a federal right "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), it is proper to grant judgment even if one must "assume[ ], *arguendo*, that [the officer] erred



in concluding that [compliance with federal law] existed." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991).[1]

Given these accepted teachings, it is surprising that this case even presented any controversy to the Court of Appeals.

First, the underlying, undisputed facts of this case do no more than implicate the gap between two decisions of this Court: *Payton v. New York*, 445 U.S. 573 (1980), which holds that a police officer cannot make a warrantless nonconsensual entry into the home of a suspect, even with probable cause, in the absence of exigent circumstances, and *United States v. Santana*, 427 U.S. 38 (1976), which makes clear that a warrantless arrest on probable cause is constitutional if made in a public place after the suspect has left his home. Neither *Payton* nor *Santana* answer the question raised by the "front porch" arrest in this case, and that should have been the end of the matter in the Court of Appeals. Plaintiffs in this case argued to the District Court "that for all practical purposes, the

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[1] Qualified immunity under *Harlow* is thus, as a substantive matter, the doctrinal flip-side of the immunity every plaintiff enjoys under Fed. R. Civ. P. 11, as presently worded. Just as federal civil rights plaintiffs may advance losing arguments that are " 'warranted by existing law or a good faith argument' for changing the law," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990), without running the risk of paying their opponents' attorneys' fees, government officers under *Harlow* may take positions that similarly aggressively seek to advance an unestablished rule of law in a particular case. Government officials, like federal Plaintiffs who seek to avoid Rule 11 sanctions, need not have "on point" authority for every action they undertake, for to require such rigid predicates to invoking the powers of government would freeze the government in its tracks.

arrest occurred in the home because Mr. Elder was restrained in the home, once defendants 'constructively crossed' the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out." J.A. 5. But this notion of "constructive crossing" is nowhere foreshadowed in *Payton*.[2] Indeed, the "fundamental characteristic" of the evil *Payton* sought to address was "breach of the entrance to an individual's home." 445 U.S. at 589. Nor is this "gap" at all "clearly" filled in by the decisions of which Defendants had notice defining what constitutes a "seizure" for purposes of the Fourth Amendment. *E.g., INS v. Delgado*, 466 U.S. 210 (1984).

Thus, precisely because Mr. Elder could remain in his house without any interference whatsoever until either his supplies ran out (or the police obtained a warrant), and was free from being physically questioned in person by police, even if Mr. Elder had a "reasonable fear that [he] would be detained upon leaving," he was not clearly seized *before* he left the house and stepped onto his porch. *Cf. Delgado*, 466 U.S. at 219.

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[2] Perhaps the case would be different if police threatened to destroy the house or shoot or otherwise harm Mr. Elder if he did not come out, although even in that instance, if in fact Plaintiff's proof were that there clearly were not "exigent circumstances," and, as Plaintiff admits, a telephone hookup was in place, Mr. Elder could be charged with some duty to remind the police of their obligations in this situation. *Compare Tennessee v. Garner*, 467 U.S. 1 (1984), *with Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). If he did so, and the threat were withdrawn, Mr. Elder could be considered free to move about for Fourth Amendment purposes.



In fact, to hold that a warrant *is* necessary in such cases would raise a serious Fourth Amendment dilemma: is it preferable, from a civil liberties perspective, to encourage obtaining a warrant to arrest an individual inside his home, with the attendant invasions of privacy that arise from a search "incident to arrest," or should the warrant requirement be waived when, at least as in the circumstances of this case, the only alleged facts that even arguably alerted Mr. Elder that he was fully under arrest *in* his house were the presence of several armed officers *around* the house; roadblocks in the *area* of the residence; the detention of Plaintiff's *brother*; and the use of a loudspeaker and telephone to communicate that Plaintiff "should" surrender? J.A. 5 (emphasis added).

It is the hallmark of qualified immunity analysis that the Court is not required to answer this question in order to rule for Respondents. The critical fact "is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell v. Forsyth*, 472 U.S. at 535. Plainly as a matter of this Court's precedents, at the time Respondents acted the question was open, even in the clear absence of exigent circumstances. The question we believe the Court must ask is this: was the "seizure" or "crossing" question at issue in this case such that this Court would seriously consider granting certiorari on its merits, or was that issue " 'insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit.' " *Hagans v. Lavine*, 415 U.S. 528, 543 (1974) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974)).

That the answer is that this case is in the former, not latter, category, is demonstrated by this Court's decision

in *Michigan v. Chesternut*, 486 U.S. 567 (1988), handed down several months after the "arrest" in this case. As the Court noted in *Chesternut*, the test for determining whether a person has been placed under arrest "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at 573. Whatever this Court's answer is as to whether Mr. Elder was "arrested" in some sense in his house before he left it, good arguments can be made that "whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." *Id.* at 577 (Kennedy, J., joined by Scalia, J., dissenting). In 1987, when the arrests at issue occurred, it was neither "plainly incompetent," nor a "knowing violation" of "American law," as announced by *this* Court, to engage in the conduct at issue in this case, even in the clear absence of exigent circumstances as described in *Payton*.

A second major ground why the Court should affirm on the merits of the immunity question is whether a "reasonable officer" would believe that exigent circumstances existed in any event. As the District Court observed, this case presented circumstances including a suspect believed to be wanted for a crime of violence (Elder was wanted for aggravated battery), who was believed to be armed, and who was likely to flee. *See* J.A. 6-7. The District Court held there were genuine issues of material fact on this question, but neither the District Court nor Petitioners adduced any "specific facts," within the meaning of Rule 56(e), Fed. R. Civ. P., to rebut the fact



that, when police came upon the scene "the Elder brothers [were] loading what appeared to be camping equipment into a pickup"; nor did Plaintiff rebut that police learned for the first time upon coming to the Elder home that Petitioner "had access to several firearms in the home." J.A. 3. In this Court's leading case on the subject of exigent circumstances, *Michigan v. Tyler*, 436 U.S. 499 (1978), the Court cautioned that the lower courts ought not be "unrealistically narrow" in their assessment of exigency. *Id.* at 510. Warrantless entries are clearly valid when officers are in "hot pursuit" of an armed felon, or act to prevent imminent destruction of evidence. *Id.* at 509. Indeed, the general test of "exigent circumstances" is whether "there is compelling need for official action and no time to secure a warrant." *Id.* In light of the test under *Harlow* – whether an officer would have been "plainly incompetent" in thinking that this general test authorized the actions here – immunity exists on this straightforward ground as well. Indeed, to hold otherwise suggests it was frivolous for Defendants to raise the exigent circumstances exception on the merits. *Cf. Anderson v. Creighton*, 483 U.S. at 639, 640, *with Cooter & Gell v. Hartmarx*, 496 U.S. at 399. None of the Courts below so held; nor should this Court, either.

Although the foregoing analysis would seemingly be dispositive of the immunity issue here, many of the courts of appeals have struggled to determine when, and under what circumstances, the "law of the circuit" may give rise to "clearly established American law," thus leading to the problem in this case, namely, whether *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), compels a different result or

ought to have been cited in the trial court. Indeed, the Ninth Circuit has candidly acknowledged that "[t]he circuits disagree as to whether [even] intercircuit conflict on a point of law negates the clearly established nature of a right." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) (citing and discussing cases from Third, Seventh, and Tenth Circuits, and announcing that "the absence of binding precedent in this circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the clearly established nature of a right").

The amici States submit that this formulation of the immunity inquiry, and the courts of appeals' preoccupation with circuit precedent, seriously undercuts the central and exclusive role of this Court in defining "American law" in a controlling manner for all lower courts, state and federal.

Like other prudential doctrines, the immunity provided by *Harlow* exists because a less protective rule "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," "depriv[ing] this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari," *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J., for a unanimous Court) (rejecting nonmutual collateral estoppel in cases against the Government). In cases implicating 42 U.S.C. § 1983, these prudential considerations are even more pressing, because state as well as federal courts have a vital role to play in interpreting the Constitution's mandates on state officers. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.1 (1985) (citing, *e.g.*, *Martin v.*



*Hunter's Lessee*, 1 Wheat. 304, 341-44 (1816)). Allowing "law of the circuit" to play the forceful role that it does in qualified immunity analysis in many circuits is to not only "denigrate[] the judges who serve on the state courts," *id.*, but also diminish this Court's role in defining "American law." *See Hutto v. Davis*, 454 U.S. 370, 375 (1982).

The relevant question on a qualified immunity issue, we submit, is whether counsel defending the conduct at issue would have been, at the time the conduct at issue occurred, on good ground in seeking to invoke this Court's predicates for a writ of certiorari on the underlying merits issue in the case. Those situations, set out in this Court's Rule 10.1, include not only conflicts among the courts of appeals, or among, or involving the highest courts of the States, but also include cases involving an "important question of federal law which has not been, but should be, settled by this Court." After all, the immunity issue turns upon whether "the question was open at the time [Defendant] acted," *Mitchell*, 472 U.S. at 535, and this Court's Rule 10.1 is targeted on precisely those questions.

This standard is important and compelling, because it makes wholly irrelevant the procedural issue in this case whether the Petitioner ought, or ought not, be punished for his failure to cite the *Al-Azzawy* decision of the Ninth Circuit in the District Court. In looking to "American law," the Ninth Circuit ought to have focused on whether *this* Court's precedents created "clearly established" law; and because no one, not even Petitioner, has ever urged that this is the case, proper elaboration of the

test for qualified immunity therefore requires this Court to affirm.

Even if this were not so, however, as the Ninth Circuit panel pointed out (J.A. 35), all of the *Al-Azzawy* panel's analyses of the "constructive seizure" issue were *dicta*, because the court concluded that exigent circumstances were present there in any event. Thus, even if *Harlow* requires a court of appeals to follow "clearly established" circuit precedent in assessing immunity, it does not require adherence to the oxymoronic notion of "clearly established" circuit *dicta*. Because, for all these reasons, the judgment for Defendants was wholly correct, this Court should affirm without regard to the procedural issue here.

### B. If the Court Reaches the Issue Whether Petitioner Should Be Held Accountable for His Counsel's Failure Adequately to Brief the Immunity Issue in the District Court, This Court Should Nonetheless Affirm the Ninth Circuit.

As this Court has repeatedly emphasized, qualified immunity is "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' " *Burns v. Reed*, 111 S.Ct. 1934, 1944 & n.8 (1991) (quoting *Malley v. Briggs, supra*, 475 U.S. at 341)). As it has weighed the competing policies implicated by the immunity doctrine, this Court has also held that "the 'consequences' with which we were concerned in *Harlow* are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial –



distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Mitchell v. Forsyth, supra*, 472 U.S. at 526. Thus, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' " *Id.* Therefore, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an [immediately] appealable 'final decision' within the meaning of 28 U.S.C. § 1291" despite the lack of a final judgment. *Id.* at 530. Moreover, as this Court has suggested, a "heightened pleading standard" may well be appropriate in cases where an officer's "immunity from suit" is at issue. *See Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. 1160, 1162-63 (1993) (rejecting the standard "in this case" because what was at issue was whether a municipal defendant was subject to "liability" on the merits).

The Ninth Circuit's requirement that a civil rights Plaintiff place an individual-capacity Defendant on notice of the relevant universe of legal precedent relied on to pierce an immunity defense is quite consistent with, indeed, supported by, the procedural rules this Court has crafted so as properly to implement the goals and policies underlying *Harlow* immunity. Whether intentional or not, reversal of a grant of immunity on the basis of wholly new (but previously discoverable) authorities cited for the first time on appeal not only does disservice to the process of litigation in the District Courts as a general matter, but, even if tolerable in other contexts, imparts an entire additional layer of " 'general costs of subjecting officials to the risks of [litigation],' " *Mitchell*, 472 U.S. at

526. Imposing these risks – which in this case alone could, if Petitioner's appeal is granted, subject Respondents to years of additional litigation without any assurance that the Petitioner would be entitled to relief – is barred by *Harlow*.

Indeed, even as a general matter, litigants cannot bring up new lines of argument for the first time in the courts of appeals as a matter of right. As this Court has noted with regard to its own treatment of issues poorly raised below, "[u]nder the mere enlargment doctrine, '[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed[,]' " but "the federal question must be brought to the attention of the court below in some manner." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). When issues of immunity are at stake, the case can and often does turn on a very distinct line of decisional law. By requiring Plaintiffs to define the universe of case authority on which they rely, the Ninth Circuit has laid down a rule that is quite consistent with due process concerns and the "heightened pleading standards" that most Circuits have adopted, and which this Court left intact by its recent decision in *Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. at 1162-63.

Thus, while no one would possibly dispute that "the province and the duty of the judicial department is to say what the laws is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "the law" does not make civil rights plaintiffs immune to their forfeitures in the District Court. As Justice Holmes wrote for this Court eighty years ago, "the party who brings a suit is master to



decide what law he will rely upon." *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913).

Reversal of the Ninth Circuit's decision in this case is even more inappropriate given Elder's nearly total failure even in the Ninth Circuit to rely on the allegedly critical precedent. Although Elder perfunctorily cited *Al-Azzawy* to the Ninth Circuit panel in his main briefs, he affirmatively refused to rely on it when pressed by the panel, conceding that "all cases are distinguishable." J.A. at 35 n.1. At some level, if the failure to *Al-Azzawy* was prejudicial to Elder's case – a point we dispute – Elder's remedy lies with his counsel, "not against third parties." *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983). Accordingly, this Court should affirm.

## CONCLUSION

For the foregoing reasons and for those stated by Respondents, the judgment of the Court of Appeals should be affirmed.

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